

1 Nicole M. Norris (SBN 222785)  
James F. Hurst (Admitted Pro Hac Vice)  
2 David J. Doyle (Admitted Pro Hac Vice)  
Samuel S. Park (Admitted Pro Hac Vice)  
3 WINSTON & STRAWN LLP  
101 California Street, Suite 3900  
4 San Francisco, CA 94111-5894  
Telephone: 415-591-1000  
5 Facsimile: 415-591-1400  
Email: nnorris@winston.com; jhurst@winston.com;  
6 ddoyle@winston.com; spark@winston.com

7 Attorneys for Defendant  
ABBOTT LABORATORIES

9  
10 **UNITED STATES DISTRICT COURT**  
11 **NORTHERN DISTRICT OF CALIFORNIA**  
12 **OAKLAND DIVISION**

13 IN RE ABBOTT LABS NORVIR )  
ANTITRUST LITIGATION )

Case No. C-04-1511 CW

14 )  
15 ) **REBUTTAL EXPERT REPORT OF JOEL**  
16 ) **W. HAY, PH.D.**

17 ) **HIGHLY CONFIDENTIAL**  
18 )  
19 )  
20 )  
21 )  
22 )  
23 )  
24 )  
25 )  
26 )  
27 )  
28 )

1 **I. INTRODUCTION**

2 **A. Qualifications**

3 1. I am an Associate Professor and Founding Chair of the Department of Pharmaceutical  
4 Economic and Policy at the University of Southern California (USC). Our faculty in the School of  
5 Pharmacy constitutes the largest and most prominent academic group in the United States focused  
6 specifically on pharmaceutical economics. I also have a joint appointment in the USC Department  
7 of Economics. I specialize in the fields of pharmaceutical economics and health economics.

8 2. I have published more than 100 peer-reviewed scientific articles and numerous other  
9 reports and reviews in the fields of pharmaceutical economics and health economics. I am a  
10 founding Executive Board member of the International Society for Pharmacoeconomics and  
11 Outcomes Research and Founding Editor of its scientific peer-reviewed journal, *Value in Health*.  
12 *Value in Health* is the leading scientific journal in Health Economics, Pharmaceutical Economics,  
13 Health Policy, and Health Services Research according to the ISI Journal Citation Report. I am a  
14 member of the Executive Board of the American Society of Health Economists. I am also a  
15 Scientific Advisory Board member for the Disease Management Association of America and for the  
16 International Society for Pharmacoeconomics and Outcomes Research.

17 3. I earned my B.A. *summa cum laude* in economics from Amherst College in 1974, and  
18 my M.A., M.Phil. and Ph.D. in economics from Yale University between 1976 and 1980. I have  
19 taught at Stanford University, University of California at Santa Barbara, University of Connecticut,  
20 and Yale University, and have been a tenured faculty member at USC since 1992.

21 4. I have provided expert consultation on pharmaceutical economics and health  
22 economics to the U.S. Health Care Financing Administration (now the Center for Medicare and  
23 Medicaid Services), the U.S. Agency for Health Care Research and Quality, the U.S. Centers for  
24 Disease Control and Prevention, the U.S. Public Health Service, the U.S. Food and Drug  
25 Administration, the U.S. Environmental Protection Agency, the Government of Hungary, the Hong  
26 Kong Centre for Economic Research, the Hong Kong Medical Executives Association, the World  
27 Bank, the California AIDS Commission, the California Medi-Cal Drug Advisory Board, the County  
28 of San Diego Medically Indigent Adult program, and the County of Sacramento Homeless Program.

1 I have also provided expert reports in several cases relating to pharmaceutical and medical issues. A  
 2 complete list of my current and past positions as well as a list of my prior experience as an expert  
 3 within the preceding four years is contained in my curriculum vitae (attached hereto as Exhibit 1).

4 **B. Assignment**

5 5. Plaintiffs allege that Abbott Laboratories ("Abbott") has violated the antitrust laws by  
 6 raising the price of one of its patented HIV drugs, Norvir (which is the brand name for ritonavir).<sup>1</sup>  
 7 Norvir is used primarily to "boost" the effects of other HIV drugs called protease inhibitors ("PIs").  
 8 According to plaintiffs, because Norvir is the only PI that has such boosting effects, Abbott has a  
 9 monopoly in a market consisting of PI boosters (the claimed "Booster Market").<sup>2</sup> Plaintiffs allege  
 10 that Abbott has tried to "leverage" its monopoly power in the "Booster Market" to monopolize a  
 11 market consisting of "PIs only when they are prescribed with Norvir as a booster" (the so-called  
 12 "Boosted Market").<sup>3</sup> In particular, plaintiffs claim that Abbott has raised the price of Norvir, but  
 13 kept constant the price of Kaletra, Abbott's own combination HIV drug that contains ritonavir and  
 14 another PI (lopinavir), in order to eliminate suppliers of other PIs that are prescribed with Norvir as a  
 15 booster.<sup>4</sup>

16 6. I have been retained by counsel for Abbott to analyze and respond to the antitrust  
 17 allegations contained in the Doe Complaint and the SEIU Complaint. I also have been asked to  
 18 examine the opinions offered by plaintiffs' economic expert, Douglas F. Greer ("Prof. Greer"), and  
 19 certain opinions of plaintiffs' medical expert, Paul A. Volberding, M.D. ("Dr. Volberding"), and to  
 20 assess whether the conclusions reached are consistent with the economic evidence and accepted  
 21 economic principles. I am being compensated at \$625 per hour for my work.

22  
 23 <sup>1</sup> *John Doe 1 and John Doe 2, on behalf of Themselves and All Other Persons Similarly Situated, v.*  
 24 *Abbott Laboratories*, First Amended Class Action Complaint, ("Doe Complaint"), pp. 5-6; *Service*  
 25 *Employees International Union Health And Welfare Fund, on Behalf of Itself and All Other*  
*Similarly Situated, vs. Abbott Laboratories*, Class Action Complaint, ("SEIU Complaint"), p. 6.

26 <sup>2</sup> Doe Complaint, pp. 4, 7; SEIU Complaint, pp. 5, 8.

27 <sup>3</sup> Doe Complaint, pp. 4, 7, 9-10; SEIU Complaint, pp. 5, 8, 11.

28 <sup>4</sup> Doe Complaint, pp. 5-6; SEIU Complaint, p. 6.

7. This report summarizes my current opinions based on the materials I have reviewed to date. My review has included the Doe Complaint, the SEIU Complaint, the expert report of Prof. Greer,<sup>5</sup> other declarations filed by Prof. Greer,<sup>6</sup> the expert report of Paul A. Volberding, M.D. (“Dr. Volberding”),<sup>7</sup> the declaration of Jeffrey Devlin,<sup>8</sup> various depositions (including the depositions of Prof. Greer and Dr. Volberding), other filings in the case, produced documents, HIV market research reports, and various sources of publicly available information about the pharmaceutical industry. A complete list of the materials I have relied upon is cited throughout this report and is attached as Exhibit 2. I reserve the right to modify or refine my statements and conclusions if new information is made available to me through discovery or other sources.

### C. Summary of opinions

8. Based on my review and analysis to date, I conclude the following:

(1) Plaintiffs and Prof. Greer do not point to any conduct by Abbott that is exclusionary or anticompetitive.

i. Abbott’s pricing structure does not fit into any category of anticompetitive conduct. In essence, plaintiffs and Prof. Greer claim that Abbott’s pricing structure is anticompetitive because the price of Norvir is too high and/or the price of Kaletra is “very low” or “a bargain.” But Abbott’s patents on Norvir and Kaletra give Abbott the legal right to determine the price that it charges for Norvir, and for Kaletra.

---

<sup>5</sup> *In re Abbott Laboratories Norvir Antitrust Litigation*, Expert Report of Douglas F. Greer, Ph.D., September 26, 2007 (“Greer Report”).

<sup>6</sup> *In Re Abbott Labs Norvir Antitrust Litigation*, Declaration of Douglas F. Greer In Support of Plaintiff’s Motion for Class Certification, October 5, 2006 (“Greer Class Certification Declaration”); Declaration of Prof. Douglas F. Greer Re: Defendant Abbott Labs Motion for Summary Judgment (“Greer Summary Judgment Declaration”).

<sup>7</sup> *In Re Abbott Labs Norvir Antitrust Litigation*, Expert Report of Dr. Paul A. Volberding (“Volberding Report”).

<sup>8</sup> Declaration of Jeffrey Devlin in Support of Abbott Laboratories’ Renewed Motion for Summary Judgment (“Devlin Declaration”).

1           ii. Pricing “very low” can only be anticompetitive if it is predatory. But neither  
2           plaintiffs nor Prof. Greer allege, nor can they allege, that the implicit price of  
3           lopinavir, the PI in Kaletra that is boosted by ritonavir, is below cost.

4           iii. Predation also requires that there be a “dangerous probability” of recoupment.  
5           This is because predatory pricing is only a profitable exclusionary strategy if  
6           the firm can raise prices, and maintain supracompetitive prices, after rivals are  
7           driven out of the market. But Abbott’s pricing has not driven out any rivals.  
8           Indeed, the market share of rival boosted PIs have increased and new boosted  
9           PIs have entered the market since the Norvir price increase. Nor could  
10          Abbott’s pricing drive rivals out of the market because, as plaintiffs’ expert  
11          Dr. Volberding indicates, HIV patients and doctors do not make drug  
12          decisions based on price.

13          (2) Prof. Greer discusses several types of potentially exclusionary behavior, including  
14          tying, bundled discounts, raising rivals’ costs, and making an essential input  
15          incompatible with rival’s products. But Abbott has not engaged, nor do plaintiffs  
16          allege that Abbott has engaged, in any of such conduct.

17          i. Abbott has not engaged in tying. Ritonavir is available separately as Norvir.  
18          Nor does Abbott’s pricing have “the same economic leverage as a tie-in,” as  
19          Prof. Greer alleges. A tie would eliminate Norvir as a booster to competing  
20          PIs, and would force all patients on boosted PI regimens to take Kaletra  
21          (ritonavir and lopinavir combined). However, all class members are  
22          prescribed ritonavir (Norvir) and not lopinavir (*i.e.* are not prescribed  
23          Kaletra). Thus Abbott’s pricing cannot be equivalent to a tying arrangement  
24          for any class member.

25          ii. Prof. Greer also claims that Abbott’s pricing is a “first cousin” to bundled  
26          discounts and raising rivals’ costs. However, Abbott’s pricing is entirely  
27          different from bundled discounts and raising rival’s costs. In contrast to  
28          bundled discounts, Abbott does not offer discounts on Norvir contingent on

1 the patient purchasing lopinavir. More importantly, anticompetitive bundled  
2 discounts require that the discounts be large enough such that the implicit  
3 price of the competitive good (lopinavir according to plaintiffs' theory) is  
4 below cost when the entire discount is attributed to this good. But plaintiffs  
5 and Prof. Greer do not, and cannot, allege that the implicit price of lopinavir is  
6 below cost.

7 iii. "Raising rivals' cost" is an economic theory in which a dominant firm takes  
8 actions for the purpose of increasing the cost of competitors. Such conduct is  
9 unprofitable in the short-run but can be a profitable exclusionary strategy if it  
10 places competitors at a significant cost disadvantage and thereby drives  
11 competitors out of the market. But conduct that is profitable independent of  
12 any exclusionary effect, such as simply raising the price of an input, cannot be  
13 regarded as "raising rivals' costs." The Norvir price increase cannot be  
14 considered "raising rivals' costs" because it was profitable regardless of any  
15 claimed exclusionary effect in the so-called "Boosted Market."

16 (3) Prof. Greer provides no reasonable theory why Abbott would profit from  
17 "leveraging" Norvir to shift sales from rival boosted PIs to Kaletra.

18 i. Economics shows that, except under very specific circumstances, a  
19 monopolist will not find it profitable to leverage its monopoly into  
20 complementary (or "vertically related") markets. A monopolist typically  
21 would prefer complementary markets to be competitive, because its sales are  
22 greater the more competitive are such complementary markets.

23 ii. Prof. Greer also never explains how "leveraging" Norvir into the so-called  
24 "Boosted Market" is a profitable strategy for Abbott. Prof. Greer's theory  
25 assumes that it would be profitable for Abbott to sacrifice Norvir to shift sales  
26 to Kaletra. But, according to Prof. Greer's own theory, Abbott would lose a  
27 sale of Norvir for every patient that switches from a boosted PI regimen to an  
28 alternative regimen as a result of the Norvir price increase. Even if some of